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No. 82-940

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELIZABETH ANDERSON HISHON,

Petitioner,

—v.—

KING & SPALDING,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF Robert Abrams, Michael A. Bamberger, James E. Daniels, Lloyd Frank, Victor A. Kovner, Elliot C. Lichtman, Thomas H. Moreland, Maurice N. Nessen, Francis T.P. Plimpton, Norman Redlich, Martin F. Richman, Albert J. Rosenthal, Shirley Adelson Siegel, John Silard, Michael H. Simonson, Edith I. Spivack, David G. Trager, George Zeitlin, Council of New York Law Associates and the State of New York Division of Human Rights AS AMICI CURIAE IN SUPPORT OF THE PETITIONER AND BRIEF ATTACHED

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For The Eleventh Circuit

MOTION FOR LEAVE TO

FILE BRIEF AMICI CURIAE

The 18 named attorneys, who are prominent government officials, law school deans and law firm partners, join with the New York State Division of Human Rights and with the Counsel of New York Law Associates respectfully to move this Court for leave to file the accompanying brief Amici Curiae in support of petitioner Elizabeth Anderson Hishon. Together with Ms. Hishon, we ask this Court to reverse the decision of the Eleventh Circuit holding that Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 et seq. is inapplicable to promotion to partnership within private law firms.

Consent to file the attached brief has been sought from the parties; while counsel for Ms. Hishon have consented, counsel for respondent has not approved the filing as to all parties to this brief. We therefore request permission of this Court pursuant to Rule 36.

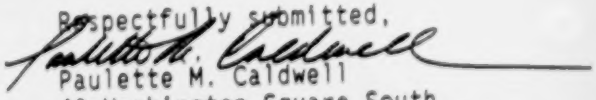
The Interest of the Amici

The Amici are 18 individuals, one organization concerned with equality of opportunity for women and for racial, religious and ethnic minorities in the practice of law, and the nation's oldest state fair employment agency. One individual is the Attorney General of the State of New York. As such he is in charge of all legal business in which the state has an interest, including the enforcement of New York's laws against discrimination in employment. Three of the individual Amici are deans of major law schools whose students and alumni are affected by discrimination in the practice of their profession. Twelve are partners or principals at nine major law firms in New York City and Washington, D.C., most of which may be affected by the decision in this case. One is a former Solicitor General of the State of New York, and another is a high-level municipal attorney. The Council of New York Law

Associates is an organization of junior-level attorneys who hope eventually to be considered for law firm partnership on a nondiscriminatory basis.

The Amici are either themselves attorneys, an organization of attorneys, or a state agency dealing with employment discrimination. As such, Amici have a particular and compelling interest in the special facts of this case. The Amici believe that Title VII of the Civil Rights Act of 1964 is a crucial protection for minorities and women and wish to share with the Court their view of the proper interpretation of the statute as applied to employees of partnerships.

Respectfully submitted,



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Payne v. Travenol Labs, 673 F.2d 798 (5th Cir. 1982).	10

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110 Cong. Rec. 13088 (1964)	21
188 Cong. Rec. 3802 (1972).	10, 11
The Year of the Accountant New York Times, Business Section (Jan. 3, 1982)	14
L. Tribe, American Constitutional Law, 720, (1978).	32, 33
National Law Firm Survey, National Law Journal, Sept. 13, 1982	37
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Associates is an organization of junior-level attorneys who hope eventually to be considered for law firm partnership on a nondiscriminatory basis.

The Amici are either themselves attorneys, an organization of attorneys, or a state agency dealing with employment discrimination. As such, Amici have a particular and compelling interest in the special facts of this case. The Amici believe that Title VII of the Civil Rights Act of 1964 is a crucial protection for minorities and women and wish to share with the Court their view of the proper interpretation of the statute as applied to employees of partnerships.

STATEMENT OF THE CASE

This case presents for decision one straightforward, and important, question of statutory interpretation: are decisions concerning promotion to partnerships and discharge of associates in large law firms exempt from the prohibitions of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e et seq. ("Title VII")?

Petitioner Elizabeth Anderson Hishon was employed as an associate by the law firm of King & Spalding from 1972 until her discharge in 1979. By that time, King & Spalding was comprised of more than 100 attorneys-- approximately half of whom were partners-- and more than 50 other employees who were not attorneys. (Complaint, Answer ¶¶2(b)). In 1979, Ms. Hishon, who was only the second woman employed as an attorney in the 100-year

existence of the firm,* was denied partnership, and discharged pursuant to the firm's "up or out" policy. She then filed suit under Title VII charging discrimination on the basis of sex.

The District Court for the Northern District of Georgia dismissed the complaint for lack of subject-matter jurisdiction. Rule 12(b)(1), Fed. R. Civ. P. With scarcely a nod toward the language or legislative history of Title VII, the Court ruled that decisions whether to promote a law associate to partnership are protected by the same associational rights which protect decisions concerning marriage, and that those associational rights, as a matter of law, defeated any claims petitioner could raise under Title VII. As the District Court put it:

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* A woman was hired in 1944 to serve as a permanent associate. She remained with the firm until 1977. (Brief of Petitioner in Application for Writ of Certiorari at 4).

> "To use or apply Title VII to coerce a mismatched or unwanted partnership too closely resembles a statute for the enforcement of shotgun weddings." 25 Empl. Prac. Dec. (CCH) ¶ 31,703 at 23,062 (N.D. Ga. 1980).

The Court of Appeals for the Eleventh Circuit affirmed, over the dissent of Circuit Judge Tjoflat. 678 F. 2d 1022 (11th Cir. 1982) Evincing the same concern for King & Spalding's rights of "voluntary association", the majority construed Title VII quite narrowly. It held that promotion to partnership was not a "term, condition or privilege of employment" protected by section 703(a)(1) or an "employment opportunity" protected by section 703(a)(2). Moreover, the Court held, application of King & Spalding's "up or out" policy, which resulted in Ms. Hishon's discharge, was exempt from the discharge provisions of Title VII.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit majority's decision should be reversed. It conflicts with the language and intent of Congress in enacting Title VII, especially because Congress explicitly included partnerships in its definition of employers, and did not create or intend any exemption for promotion or discharge decisions of law partnerships. Congress drafted a broad statute in Title VII, and the courts have construed its coverage liberally.

To affirm the decision below would have a substantial and far-reaching deleterious effect-- plainly unintended by Congress-- because it carves out a substantial and unwarranted exemption from Title VII for partnerships which fill at least some partnership positions by promoting associates from within the firm. Since the partnership form is used by many business entities -- not simply law firms -- and

these entities also choose partners from among their employees, the logic of the majority's decision could deny the protections of Title VII to employees in a great many businesses.

In addition, the decision below relies on a mistaken view of the associational rights of partnerships like King & Spalding, and incorrectly balances those rights against the provisions of Title VII.

POINT I

THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE CONGRESSIONAL MANDATE AND WITH THE ONLY OTHER COURT DECISION ON POINT

A. The Eleventh Circuit's decision conflicts with the Congressional mandate

Congress has prohibited partnerships from discriminating against minorities or women with respect to "terms, conditions, or privileges of employment," and "employment opportunities." 42 U.S.C. §2000e-2(a)(1), (2).* In a partnership like King & Spalding, which follows the practice of filling partnership positions by promoting associates from within the firm, a promotion to partnership is a "term, condition or privilege of employment" and an "employment

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* Under Title VII, "employers" may not discriminate. 42 U.S.C. §20003-2(a)(1). An "employer" is a "person engaged in an industry affecting commerce who has fifteen or more employees . . . ." 42 U.S.C. §2000e-2(a), (b). The term "person" includes "partnerships." 42 U.S.C. §2000e(a), (b).

opportunity" within the meaning of Title VII. In addition, in those partnerships which share with King & Spalding an "up or out" policy, the forced departure of an associate, after he or she fails to be promoted to partnership, is a discriminatory discharge also covered by the statute.

In adopting Title VII, Congress intended a broad remedial statute which would reach employment discrimination in all but its most insignificant manifestations. The statute banned "all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin." County of Washington v. Gunther, 452 U.S. 161, 178 (1981), quoting Franks v. Bowman Transportation Co., 424 U.S. 757, 763 (1976). Included are discriminatory promotion practices. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). This Court, in

keeping with the Congressional mandate, has construed Title VII broadly to achieve its remedial purpose.

The courts have uniformly held that Title VII prohibits discrimination in promotions not merely to rank and file but also to middle and upper echelon positions. See, e.g., Payne v. Travenol Labs, 673 F.2d 798 (5th Cir. 1982) (technical, managerial and executive level jobs); Lieberman v. Gant, 630 F.2d 60, 64 (2d Cir. 1980) (Friendly, J.) (promotion of faculty to tenure); Kunda v. Muhlenberg College, 621 F.2d 532 (3rd Cir. 1980) (tenure decisions); Gilmore v. Kansas City Terminal Railway Co., 509 F.2d 48, 51 (8th Cir. 1975) (managerial and supervisory positions); Pinckney v. County of Northampton, 512 F. Supp. 989 (E.D. Pa. 1981), aff'd, 681 F.2d 808 (3rd Cir. 1982) (executive positions); Ste. Marie v. Eastern Railway Ass'n, 458 F. Supp. 1147 (S.D.N.Y. 1978), rev'd on

other grounds, 650 F.2d 395 (2d Cir. 1981) (top management and executive positions); Hecht v. Cooperative for American Relief Everywhere, Inc., 351 F. Supp. 305 (S.D.N.Y. 1972) (executive positions). See also Bartholet, Application of Title VII to Jobs in High Places, 95 Harv. L. Rev. 945 (1982).

Congress made no distinction between professional and nonprofessional employment, making discriminatory practices in both illegal. Promotions in professional employment situations are plainly covered by Title VII.*

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* Congress' intent to include professional employment within the scope of Title VII is clear from the legislative history available. Senator Javits, in opposing an amendment that would have excluded hospital-employed physicians from Title VII coverage said:

> "One of the things that those discriminated against have resented the most is that they . . . cannot ascend the higher rungs in professional and other life.

(Footnote continued on following page)

Moreover, Congress could not have intended the substantial exemption from Title VII that the Eleventh Circuit's decision would create. After

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(Footnote continued from previous page)

> "Yet this amendment would . . . reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion -- [among] physicians or surgeons, one of the highest rungs of the ladder that any member of a minority could attain -- and thus lock in and fortify the idea that being a doctor or surgeon is just too good for members of a minority . . . and the Federal law will not protect them." 188 Cong. Rec. 3802 (1972).

The amendment was defeated. See also EEOC v. Rinella & Rinella, 401 F. Supp. 175, 179-81 (N.D. Ill. 1975) ("[t]he courts . . . have found little distinction between professional and nonprofessional job situations, concluding that, since the primary objective of Title VII is the elimination of the major social ills of job discrimination, discriminatory practices in professional fields are not immune from attack"); Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123, 126 (S.D.N.Y. 1977) ("Congress clearly included in the objec- tives of Title VII the elimination of job discrimination in professional fields including law . . ."); Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515, 521 (S.D.N.Y. 1973), app. dis., 496 F.2d 1094 (2d Cir. 1974).

all, the logic of the Eleventh Circuit would apply equally to small closely-held businesses in proprietorship or corporate form, where associational interests certainly are at least as compelling as the large law partnership. And the Eleventh Circuit's exemption would sweep even more broadly-- for an exception to Title VII for promotions to partnership in firms such as King & Spalding would not affect only law firms. Partnership is a common form of business organization, particularly for accounting firms, advertising agencies and brokerage houses. It is also used in industry, forestry, agriculture, fishing, mining, construction, manufacturing, transportation, public utilities, wholesale and retail trade, finance, insurance and real estate. The total number of partnerships in the United States is approximately 1,153,000. U.S. Bureau of the Census, Statistical Abstract of the United States: 1981 at 535, chart 899 (102d ed. 1981). As this Court aptly observed in

Bellis v. United States, 417 U.S. 85, 93 (1970), "[s]ome of the most powerful private institutions in the Nation are conducted in the partnership form."* Congress, which intended to write a broad, remedial statute-- aimed at major social and economic inequalities-- did not intend to allow such an expansive a gap in the coverage of Title VII.

In addition to the language and legislative history of Title VII, no logical distinction exists for excluding from Title VII coverage advancement to partner at a partnership like King & Spalding while including promotions to upper level jobs in corporations or universities. The possibility of promotion in a corpo-

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* Accounting firms are generally partnerships, the largest of which have even more partners than found in law firms. In 1981, the eight largest accounting partnerships had an aggregate of approximately 7,000 partners and total revenues of over $6 billion. See The Year of the Accountant, New York Times, Business Section (Jan. 3, 1982). One such firm, Coopers & Lybrand, today has over 900 partners in the United States and nearly 2,000 partners on an international basis.

ration or award of tenure in a university acts - as an inducement to attract talented individuals to accept the institution's offer of employment and to do well once they are there. Similarly, the possibility of advancement to partner attracts associates like Ms. Hishon to the firm and motivates them to work hard. According to the record in this case, Ms. Hishon and other associates were persuaded to accept employment by King & Spalding by the promise that they would be considered for partnership on a non-discriminatory basis after five or six years of employment. Complaint ¶ 8(b). See also Answer ¶ 8(b) (". . . all associates are employed with the expectation that they will be considered for . . . partnership . . . within a reasonable period of time . . .").*

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* While only the allegations in the complaint need be taken as true for the purpose of this appeal, see Conley v. Gibson, 355 U.S. 41 (1975), the promotion practices we address are admitted by King & Spalding, as we show in the text.

Associates' work at King & Spalding was evaluated annually in terms of their progress toward partnership. Complaint ¶ 8(c). See also Answer ¶8(c) (King & Spalding admits this). King & Spalding's practice was to promote associates who received appropriate evaluations to partner. Complaint ¶ 8(d). See also Answer ¶ 8(d) (King & Spalding admits that associates who "meet the firm's standards for partnership" are promoted). In addition, King & Spalding's practice was to require associates who were not promoted to partner to seek employment elsewhere. Answer ¶ 9. These practices make advancement to partner a promotion like any other promotion. Thus, advancement to partner is within the meaning of "terms, conditions and privileges of employment" and "employment opportunities," and is covered by Title VII. See Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123, 127-28 (S.D.N.Y. 1977). See also cases cited supra at 10. The Eleventh Circuit's decision to the contrary is clearly wrong.

B. The Eleventh Circuit's decision conflicts with the only other court decision on point

The only other reported Title VII decision involving promotion to partnership squarely contradicts the Eleventh Circuit's decision. Lucido v. Cravath, Swaine & Moore, supra. In Lucido, the Court held that promotion to partnership is a "term, condition or privilege of employment" and an "employment opportunity" within the meaning of Title VII. The Eleventh Circuit in Hishon conceded that Lucido was conflicting authority but expressly rejected its holding. 678 F.2d at 1029.

Lucido was more persuasively reasoned. In Lucido, the law firm argued that since Title VII did not apply to the relationship among the partners themselves, it could not apply to the process by which an associate attorney becomes a partner. The court responded that, even assuming that Title VII does not apply to the partners themselves, it does apply to the

employer/employee relationship between the firm and the associate. Any discrimination affecting promotions -- in the context of that employer/employer relationship -- is covered by Title VII. 425 F. Supp. at 128. Cf. NLRB v. Bell Aircraft Corp., 206 F.2d 235 (2d Cir. 1953) ("immaterial that the protection . . . afforded was calculated to enable him to obtain a position in which he would no longer be protected"). See also Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973).

POINT II

THE DECISION OF THE ELEVENTH CIRCUIT RELIES ON A MISTAKEN VIEW OF THE ASSOCIATIONAL RIGHTS OF PARTNERSHIP

The Eleventh Circuit, in deference to what it perceived to be the associational rights of partners in law firms, held that a promotional opportunity for associates to partnership was not covered by Title VII. Although the Eleventh Circuit conceded that Title VII applies to promotions, even where the new position would not be covered by the statute, it could not "find the requisite Congressional intent to permit Title VII's intervention into matters of voluntary association." 678 F.2d at 1026. In the Eleventh Circuit's view, to treat the law partnership decision as an "employment opportunity" within the meaning of the statute would be to encroach impermissibly "upon individuals' decisions to voluntarily associate in a business partnership." Id. at 1028. In so holding, the

court below misconstrued the intent of Congress and the nature of constitutionally protected rights of association.

A. Congress did not intend an associational exception to Title VII of the sort found by the Eleventh Circuit.

Congress, in Title VII, did provide in a few limited situations for a balance between its remedial objectives and associational interests, where it deemed the latter to be particularly important. It did not, however, intend to allow such interests generally to preempt the statutory goal of eliminating invidious discrimination in employment. Thus, when Congress intended to create "associational" exceptions to Title VII, it did so directly and unambiguously. The statute is quite precise about where the line is drawn. It provides that employers are exempt if they have fewer than fifteen employees. 42 U.S.C. §2000e(b). As Senator Humphrey explained during the debate on Title VII, businesses, once they reach or exceed the

statutory number of employees, as a practical matter "lose most of whatever intimate, personal character they might have had." 110 Cong. Rec. 13088 (1964). Larger business organizations -- including partnerships -- cannot, therefore, rely on associational claims to avoid the statutory proscriptions against discrimination.

Similarly, "bona fide private membership club(s)" are exempt, 42 U.S.C. 2000e(b) (emphasis added), as are religious organizations which employ "individuals of a particular religion to perform work connected with . . . [their] activities," 42 U.S.C. 2000e-1. In both cases, Congress -- through express statutory provisions -- carved out precisely-defined exceptions for unusually powerful claims of free association. Nothing in the statute suggests that Congress intended this list of exceptions to be merely illustrative. If Congress had intended to add an exception for large law firms or other partnerships, Congress knew how to create one.

Even if a persuasive argument could be made for protecting the associational interests in firms with very few partners, a broad exemption for promotion to partnership is not warranted. Many, if not most, such small firms are already exempt from Title VII on one or both of two grounds. They may not meet the statutory requirement of having fifteen or more employees.* In addition, many small firms do not have a practice of making partners from the ranks of their associates, and, hence, no "promotions" within the meaning of the statute occur. If the Court believes that either the purposes of the statute or constitutional considerations demand a broader exception than

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* Existing case law suggests that the partners themselves are not counted when determining whether the fifteen-employee threshold has been reached. Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977); cf. Lucido v. Cravath, Swaine & Moore, supra at 128 (suggesting but not deciding that partners are not themselves "employees" for purposes of Title VII).

this on privacy grounds for small partnerships, such exceptions could be carved out in later cases on appropriate facts.* At the very least, large partnerships like King & Spalding, which regularly promote their employees to partnership, cannot claim such a high degree of intimacy among themselves that they should be distinguished from other sorts of business organizations of comparable size on associational grounds.

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* Significantly, in Buckley v. Valeo, 424 U.S. 1, 68-74 (1976), where a potential threat to associational rights was recognized with respect to supporters of minor parties and independent candidates under provisions of the Federal Election Campaign Act, this Court did not -- as the Eleventh Circuit did here -- simply carve out from the reporting requirements of the Act a general exemption for contributors to minor parties and independents. Instead it left the issue to be resolved on a case-by-case basis as specific claims arose. Id. at 74. Thus, even where classic rights of association for political speech were involved, this Court has eschewed the wholesale rejection of the applicable statutory provision adopted by the lower courts in this case.

This view of the balance between the objectives of Title VII and associational rights is consistent with lower court authority on the point. With the exception of the two opinions below in Hishon, courts have been loathe to carve out exceptions to the statute to protect associational and related interests. Lucido v. Cravath Swaine & Moore, supra, the only case other than Hishon to address the promotion of associates to partnership in law firms, rejected the argument that Congress did not mean Title VII to reach such promotions because it would infringe First Amendment rights. Id. at 129.

A comparable issue has faced courts in reviewing tenure decisions at colleges and universities. Schools argued that their interest in academic freedom -- an interest akin to rights of association and arising similarly under the First Amendment -- required courts virtually to abstain from reexamining the basis

for tenure denials. Powell v. Syracuse University, 580 F.2d 1150, 1153-54 (2d Cir. 1978). Indeed, tenure decisions -- like elevation to partnership -- do differ in significant ways from ordinary promotions and other employment decisions. As Judge Friendly once commented, "In contrast to an ordinary teaching position, terminable at the end of any academic year, . . . advancement to tenure entails what is close to a life-long commitment by a university . . . ." Lieberman v. Gant, 630 F.2d 60, 64 (2d Cir. 1980). Yet despite their sensitivity to the claims of universities and colleges, the lower courts have refused to interpret Title VII to mean that "academic freedom embraces the freedom to discriminate." Powell v. Syracuse University, 580 F.2d at 1154. Accord, Lieberman v. Gant, supra; Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980). The courts agree that Congress intended to rectify employment bias in academic institutions and therefore recognize

that a reluctance by judges to second-guess a school's assessment of academic performance cannot be allowed to result in effective nullification of that basic congressional intent.

In short, the Eleventh Circuit's narrowing of the reach of Title VII is supported neither by reference to its broad remedial purpose, nor by the structure of the act.

B. The Eleventh Circuit misapplied settled principles of law governing rights of free association.

1. Rights of association cannot justify discriminatory practices.

In addition to misreading Congress's intent in Title VII, the Eleventh Circuit misapplied constitutional law relating to freedom of association. The court expressed concern that if Title VII were to be applied to promotions to partnership, the result would be to encroach "upon individuals' decisions to voluntarily associate in a business partnership." 678 F.2d at 1028. The District Court

was even more explicit in voicing the constitutional ground for its decision. Judge Edenfield quoted the following language from a concurrence by Justice Goldberg in Bell v. Maryland, 378 U.S. 226, 313 (1964), to support his view that associational interests of business partnerships outweigh the anti-discrimination policies of Title VII:

> Prejudices and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.

Hishon v. King & Spalding, 25 Empl. Prac. Dec. (CCH) ¶31,703 at 20,061 (N.D.Ga. 1980).

Whatever the view of twenty years ago, Justice Goldberg's language is not an accurate statement of the law today. This Court in a number of contexts has clearly stated that acts of discrimination may not escape regulation

simply by cloaking themselves in the mantle of First Amendment rights of association. When the First Amendment was raised as a defense by proprietors of a racially discriminatory private school who were sued for depriving black children of their civil rights under federal law, this Court responded that:

> "it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable . . . . But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle."

Runyon v. McCrary, 427 U.S. 160, 176 (1976). Similarly, in Norwood v. Harrison, 413 U.S. 455, 470 (1973) -- a challenge to loans by Mississippi of textbooks to students in racially segregated private schools -- this Court said:

> "Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections."

Although citizens are constitutionally protected in their right to band together to promote ideas -- including the idea that discrimination on such bases as sex, race or religion is desirable -- they cannot claim the same constitutional shield when they translate their beliefs into acts which invidiously discriminate in violation of the law.*

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* Cf. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258-59 (1964) (upholding constitutionality of the public accommodations provisions of Title II of the Civil Rights Act of 1964):

> "The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate. If they are, appellant has no 'right' to select its guests as it sees fit, free from governmental regulation."

See also Railway Mail Ass'n v. Corsi, 326 U.S. 88, 93-94 (1945) (due process does not prohibit state from banning racial discrimination in union membership).

2. Even where associational rights are at stake, courts must balance competing interests -- not ignore them.

Even in cases where associational rights ordinarily entitled to constitutional protection can be demonstrated, those rights may nevertheless be limited if they conflict with sufficiently important national interests. Although freedom to associate for political purposes is a central value under the First Amendment, even there this Court has recognized that compelling government purposes can justify substantial limitations on the right. As this Court stated in CSC v. Nat'l Assoc. of Letter Carriers, 413 U.S. 548, 567 (1973): "Neither the right to associate nor the right to participate in political activities is absolute . . . ." Thus this Court has upheld laws limiting the rights of federal employees to participate in electoral campaigns, CSC v. Nat'l Assoc. of Letter Carriers, supra. This Court has also approved

limitations on the rights of private citizens to band together in support of political candidates on the grounds that regulation of their campaign contributions would help avoid the appearance and the reality of political corruption. Buckley v. Valeo, 424 U.S. 1, 24-28 (1976).

In short, this Court has expressly recognized that even when the right to associate would otherwise prevail, a compelling state interest can justify a narrowing of the right. The contrast between this Court's treatment of associational claims and the analyses of the Circuit and District Courts in this case is striking. The courts below resolved the conflict between Title VII and rights of association by simply eliminating the statute from their calculus, thereby ignoring this Court's frequent recognition of the need to balance associational claims against competing interests.

3. The Eleventh Circuit's view of associational rights ignores the essential commercial nature of law firm partnerships.

Finally, the excessive solicitude of both the Eleventh Circuit and the District Court for associational rights is particularly misplaced where, as here, it is a commercial enterprise -- a law firm -- whose associational interests are at stake. There is much in the opinions of this Court to suggest that entities do not enjoy the same measure of First Amendment protection in their commercial activities as they do in their political speech and associations. As one legal scholar has expressed it, this Court's decisions do not suggest that rights of free association are at stake whenever individuals act in concert. Rather:

> "[w]hat the Court has recognized as implicit in the first amendment . . . is a right to join with others to pursue goals independently protected by the first amendment -- such as political advocacy, litigation (regarded as a form of advocacy), or religious worship."

L. Tribe, American Constitutional Law 702 (1978) (emphasis in original) (footnotes omitted). Economic entities -- even those which are organized to perform important professional services -- cannot claim constitutional immunity from regulation solely because they happen to involve voluntary associations.

For example, this Court summarily affirmed a decision by a three-judge District Court permitting the State of Texas to allow only licensed physicians to incorporate for purposes of providing health care. Garcia v. Texas State Board of Medical Examiners, 384 F. Supp. 434 (W.D. Tex. 1974), summ. aff'd 421 U.S. 995 (1975). The non-physicians had claimed that denial of their right to incorporate infringed their interest in free association. The three-judge court responded that, while professional, business and labor groups had on occasion successfully asserted a constitutionally protected right to associate, the

claims had been based on very special facts. Either the group had been attempting to protect a right to communicate with its own members, or had been trying to advance "legitimate beliefs and ideas." 384 F. Supp. at 440. In no case had the professional or business activities of the group been deemed per se entitled to First Amendment protection.

Two other recent decisions by this Court also illustrate the difference between commercial associations which can be freely regulated and those associations which are entitled to special protection under the Bill of Rights. Those opinions are particularly pertinent because they involve the practice of law.

In re Primus, 436 U.S. 412 (1978), involved a South Carolina attorney who had been reprimanded for improperly soliciting a client. The attorney, on behalf of the American Civil Liberties Union, had contacted a woman who had been sterilized as a condition of continued

receipt of Medicaid and had arranged to represent her. Relying on NAACP v. Button, 371 U.S. 415 (1963), this Court set aside the reprimand, holding the attorney's action in seeking out an association with the client to be protected under the First Amendment because it was designed to further political expression. In so ruling, this Court expressly noted that this solicitation was not like "traditional fee-paying arrangements" and could not be viewed as "motivated by consideration of pecuniary gain rather than by . . . [the] goal of vindicating civil liberties." 436 U.S. at 429-30.

On the same day, this Court decided Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). Again, an attorney had been disciplined for improperly soliciting clients. In contrast to Primus, however, Ohralik's solicitation had no elements of political expression; it was commercial enterprise -- pure and simple. The

Court upheld this attorney's suspension. 436 U.S. at 455-56. As this Court explained:

> "A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation." Id. at 459.

This lesser degree of protection for associational interests growing out of commercial activity was also a basis for the district court's decision in Lucido, supra.

This distinction between special associational protection for political, religious and related purposes on the one hand, and lesser protection for commercial enterprise on the other, has particular salience in the context of law firm partnership decisions. Law firms are businesses. Defendant King & Spalding, at the time of its partnership decision concerning plaintiff, was composed of fifty-two partners. (On June 30, 1982, it had over sixty partners).

In fact, as of the middle of 1982, there were 90 law firms in the United States each having more than 60 partners and 15 each having more than 100 partners; the largest law firm had 236 partners. National Law Journal, National Law Firm Survey, Sept. 13, 20, 1982. These business entities are radically different from the small partnership that the judges below envisioned in carving out this new and unwarranted exemption from Title VII.

The manner of governance of King & Spalding highlights this fact. Like a corporation, it is governed by a board -- denominated management committee -- of five partners elected to staggered three-year terms. This committee makes recommendations on such matters as admission of partners to the general partnership. The American Lawyer Guide to Law Firms; 1981-82, p.57 (hereinafter "Guide"). Most large law

partnerships are governed by a board or committee, sometimes chosen by the partners and sometimes self-perpetuating. In many of the large partnerships described above, the election of partnerships by the partners is a mere formality following selection by the governing committee. In some firms, partners' shares are designated by the managing board without any formal input by the partnership itself. (Guide at 644).

Nor are these partnerships geographically compact. Their partners are often found in many locations, often miles apart. For example, the 236 partners of Baker & McKenzie are located in 28 cities spanning 5 continents. In fact, the partners in many such partnerships not only are given salary-like profit levels--rather than a percentage of profits as in the traditional, intimate model-- but may be, in effect, discharged by the management of the partnership as if they were employees.

Further support for the view that commercial activities do not, standing alone, have a claim to associational protection under the Constitution can be found in the structure of several important civil rights statutes of the past twenty years. These statutes illustrate that when Congress intended to defer to the associational interests of commercial entities, it made clear distinctions in the law for that purpose. The public accommodations provisions of Title II of the Civil Rights Act of 1964, for example, are broadly inclusive, and give citizens a right to enjoy "goods, services, facilities, privileges, advantages, and accomodations" without regard to "race, color, religion, or national origin." 42 U.S.C. §2000a(a). Among the few businesses excepted from coverage are establishments which offer five or fewer rooms for rent and have a proprietor who lives in the building, 42 U.S.C. 2000a(b)(1); private clubs;

and places not open to the public. 42 U.S.C. 2000a(e). In each of these exemptions, the commercial entities that are protected from governmental regulation reflect true privacy interests.

Similarly, the federal Fair Housing Act of 1968 exempts private individuals who sell or rent their houses, 42 U.S.C. §3603(b)(1); or dwellings with four or fewer units only "if the owner actually maintains and occupies one of such living quarters as his residence." 42 U.S.C. §3603(b)(2). The Act does reach, however, virtually all other sales or rentals of housing that could fairly be characterized as "commercial".

In each of these statutory settings, Congress specified certain commercial entities whose associational rights should be secured against legislative interference. Congress did not intend to add, willy-nilly, any and all

other commercial enterprises to this small and discrete list of exceptions to the Law.

Thus, while law partnerships may have rights of free association when they seek to express ideas or advocate political positions, they do not enjoy the same protection for the sorts of business-oriented choices King & Spalding now wishes to protect. Law firms as commercial entities could not, under the rubric of free association, admit nonlawyers to the practice of law in violation of state regulations. No more should they be able to use "voluntary association" claims to shield their promotion practices from the reach of general laws that prohibit sex and race discrimination in employment.

CONCLUSION

The Eleventh Circuit has carved out a substantial exception from the reach of Title VII -- one of the centerpieces of civil rights legislation. That exception, for promotions to partnerships, is not founded in congressional intent, the express statutory language, or applicable case law dealing with the First Amendment right of free association. It represents an unprecedented, unwarranted dilution of the hard-won rights of women and minorities and should not be allowed to stand.

This is not to say that partners may exercise no reasonable choice about who their peers shall be. Title VII, prohibits, inter alia, sex discrimination in employment. It does not inhibit a partnership's traditional exercise of discretion in the non-discriminatory selection of new members. The Lucido court recognized this principle and correctly applied it.

The Eleventh Circuit, however, incorrectly viewed Title VII as wholly subordinated to partnerships' associational claims.

Because the Eleventh Circuit misread the intended coverage of Title VII, its decision must be reversed and the matter remanded for trial on the merits.

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